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A F F I D A V I T

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

AND NOW, personally appeared before me Gary E. Wieczorek, Esquire, who, being duly sworn, deposes and says that:

I am a shareholder in the Pittsburgh law firm of Tucker Arensberg, P.C., 1200 Pittsburgh National Building, Pittsburgh, PA 15222.

I graduated summa cum laude from the University of Pittsburgh in 1981 with a Bachelors of Arts Degree and departmental honors in History. I then attended the University of Pittsburgh School of Law where I graduated summa cum laude with a Juris Doctor Degree in 1984.

Upon my graduation from law school, I became employed as an Associate with the law firm of Tucker Arensberg, P.C.. On November 1, 1991, I became a shareholder in the firm, which is comprised of 59 attorneys. I practice in the areas of litigation and employment law and my primary focus is in the area of commercial litigation. I am a member of the Allegheny County, Pennsylvania and American Bar Associations and am a section member in the Litigation and Labor and Employment Law Sections of each of those Associations.

I was admitted to practice in 1984 and am admitted to practice before all trial and appellate courts in the Commonwealth

of Pennsylvania, the United States District Court for the Western District of Pennsylvania and United States Court of Appeals for the Third Circuit.

At the request of the law firm of Koteen & Naftalin, our law firm has researched the issues surrounding certain actions taken by Attorney Lewis Cohen. As we understand the facts, Attorney Cohen represents Allegheny Communications Group, Inc ("Allegheny"). Allegheny has formally challenged the relicensing of the Pittsburgh-based radio station, WBZZ(FM), and has also filed a competing application. As Attorney Cohen describes in a Declaration that he executed on June 26, 1991 and subsequently filed with the Federal Communications Commission, Attorney Cohen traveled to Pittsburgh on June 7, 1991 to review the record of an action involving WBZZ. This lawsuit had been settled, and pursuant to a court order, the settlement was made confidential and the case record was sealed. The only item present in the closed record was a sealed envelope containing the settlement information. Attorney Cohen opened this envelope revealing a transcript containing the terms of the confidential settlement agreement. Attorney Cohen read and copied this document and later used the copy of the document as an attachment to the petition to deny WBZZ's renewal application which was filed with the FCC. Attorney Cohen states that he checked with a clerk of the Prothonotary's Office of the Court of Common Pleas of Allegheny County, Pennsylvania who provided him with permission to review the file and the sealed envelope.

As a result of Attorney Cohen's opening, copying and revealing the sealed and confidential settlement agreement, we believe that a strong case can be made that Attorney Cohen has committed an act of indirect criminal contempt. Such an act is punishable in Pennsylvania by a fine and/or a jail sentence.

Courts in this Commonwealth have long held that they possess the inherent power to enforce their orders and decrees by imposing penalties and sanctions for failure to comply. Brocker v. Brocker, 429 Pa. 513, 241 A.2d 336, 338 (1968). The courts have historically done so through contempt orders.

Contempt may be of a civil or criminal nature. Criminal contempts are further divided into direct and indirect contempts. Commonwealth v. Marcone, 487 Pa. 572, 410 A.2d 759 (1980). The distinguishing characteristic between criminal and civil contempt is that criminal contempt has as its dominant purpose the vindication of the dignity and authority of the court while civil contempt has as its dominant purpose the enforcing of compliance

In this case, Attorney Cohen has already revealed the terms of a settlement which was ordered confidential. By opening the envelope and reading, copying and revealing the contents of the settlement, Attorney Cohen has committed an act which cannot be retracted or in any way corrected by the Court. Therefore, a civil contempt order which forces Attorney Cohen to prospectively comply

In Attorney Cohen's signed Declaration, he admits that he knew the record was sealed. In total and flagrant disregard of this fact, Attorney Cohen opened the sealed envelope from the record which he knew was closed. Attorney Cohen then read the enclosed transcript which included specific instructions by the Judge ordering that all aspects of the settlement be kept confidential. Clearly, Attorney Cohen was aware that he was reading confidential documents. Yet, instead of replacing the transcript, he copied the document verbatim. Such a deliberate act done with substantial certainty that the settlement would no longer remain confidential or with such reckless disregard for the confidentiality of the settlement is obviously intentional. Medve v. Walakovits, 305 Pa. Super. 75, 451 A.2d 249, cert. denied, 461 U.S. 945 (1982). A Prothonotary's clerk could not override the Court's order and the clerk could not grant an attorney the

also addressed by statute in 42 Pa.C.S.A. §4132, a copy of which is attached.

Indirect contempt is obstructive conduct committed beyond the court's presence. Crozer-Chester, 560 A.2d at 136. Attorney Cohen's activities were not within the presence of the court under even the most expansive of definitions. Rather, Attorney Cohen violated the confidentiality of the settlement order outside of the physical boundaries of the courtroom.

§ 4132. Attachment and summary punishment for contempts

JUDICIARY & JUDICIAL PROCEDUR

court are that there be an order or decree which is on i


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COMMONWEALTH OF PENNSYLVANIA :
: SS
COUNTY OF ALLEGHENY :

AFFIDAVIT OF DEBORAH S. LAMPO

BEFORE ME, the undersigned notary public, personally appeared Deborah S. Lampo, who deposed and stated as follows:

I am Deborah S. Lampo. I am employed by the County of Allegheny as an Official Court Reporter. I have been so employed for a period of four years. In January and February of 1990, I was the court reporter who prepared the transcript of the trial in the case of Elizabeth Nelson Randolph v. Donald Jefferson, et al., No. G.D. 88-02730 in the Court of Common Pleas of Allegheny County Pennsylvania. I was also the court reporter who took the transcript of the settlement conference involving both the above case of Randolph v. Jefferson and the case of Elizabeth Nelson Randolph v. EZ Communications, Inc., No. G.D. 89-22010. The settlement conference took place in the chambers of John L. Musmanno, Administrative Judge, of the Court of Common Pleas.

During the course of the settlement conference, both parties required that the terms of the settlement be kept confidential, and the Judge so ordered, noting particularly on the record that the transcript of the conference was to be placed under seal.

Since I had never filed a transcript under seal before, when I completed the transcript, I was advised by another reporter in my office that the procedure was to place the transcript in an envelope, seal the envelope, sign the envelope over the seal, and place tape over the signature. That is precisely what I did. I then took the envelope to the Prothonotary's office and handed it to the lady at the secondary desk, advising her that the transcript was to be filed under seal. I asked her if there was anything special I should do. The lady acknowledged that she knew what to do and stated that she would take care of it.

Within a day or two, I received a telephone call from a

Mr. Cohen sounded agitated and asked how he could obtain a copy of the transcript. I told him that he could not obtain a copy but, if he wished further information, I gave him the phone number of Judge Musmanno, who would have to answer any further questions.

During the course of our conversation, I made it quite clear to Mr. Cohen that the transcript was not a public record, that it was confidential, and that, pursuant to Judge Musmanno's order, the transcript was physically sealed.

Considering all of these precautions, and the information I had given to Mr. Cohen, I was extremely surprised to learn on July 2 that Mr. Cohen had obtained the transcript, or a copy of it, and had been permitted to copy it at length.

Deborah S. Lampo

Deborah S. Lampo

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 5th DAY
OF July, 1991.

Lois I. Rippin

Notary Public

NOTARIAL SEAL
Lois I. Rippin, Notary Public
Pittsburgh, Allegheny County, PA
My Commission Expires March 15, 1994

NOT TO BE PUBLISHED - SEE LOCAL RULE 14

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-1482 September Term, 19 91

Southeast Florida Broadcasting Limited Partnership,

Petitioner

v.

Federal Communications Commission,

Respondent

Before: WALD, D.H. GINSBURG and RANDOLPH, Circuit Judges.

JUDGMENT

This case was considered on petition for review of an order of the Federal Communications Commission. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. See D.C. Cir. Rule 14(c). For the reasons stated in the accompanying Memorandum, it is

ORDERED AND ADJUDGED, by the Court, that the petition for review is denied.

The Clerk is directed to withhold issuance of the mandate herein until seven (7) days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam
For the Court

Constance L. Dupre
Clerk

Southeast Florida Broadcasting Limited Partnership v. Federal Communications Commission, No. 90-1482

MEMORANDUM

Petitioner Southeast Florida Broadcasting Limited Partnership ("Southeast") seeks review of a decision and order of the Federal Communications Commission ("FCC" or "Commission") denying its application for a permit to construct a new station and approving the mutually exclusive renewal of a broadcast license held by Metroplex Communications, Inc. ("Metroplex"). Because we conclude that the Commission committed no legal error and that there was substantial evidence in the record to support the FCC's order, we deny the petition for review.

I. BACKGROUND

Metroplex applied to the FCC for a renewal of its license for radio station WHYI-FM in Ft. Lauderdale, Florida in August 1986. In October 1986, Southeast filed a mutually exclusive competing application to construct a new radio station. Following a "comparative renewal" hearing at which both applicants presented testimony, the Administrative Law Judge ("ALJ") denied Southeast's application and granted the renewal application of Metroplex. Both the FCC's Review Board ("Board") and the Commission itself affirmed that decision. All three found Metroplex worthy of a renewal expectancy credit for substantial service to the public and all

three denied Southeast any credit for integration of ownership and management.[1]

The ALJ found that Southeast was entitled to a moderate preference with respect to the number of media outlets owned (diversification) and that Southeast was financially qualified. The ALJ also found that Metroplex had demonstrated "reasonable diligence" to ensure that nothing was broadcast on WHYI in return for undisclosed consideration or "payola" (47 U.S.C. § 317(c) (1988)),[2] although he expressed "serious reservations as to the appropriateness" of the station's practice of requesting multiple album copies from record companies and using them "for purposes

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[1]Southeast has a two-tiered ownership structure in which the limited partners have a 96% equity interest, and the General Partner and proposed full-time manager has a 4% equity interest. However, the ALJ rejected this two-tiered structure as a "sham" given the General Manager's lack of broadcast experience and lack of financial investment in the partnership. Initial Decision of Chief Administrative Law Judge Thomas B. Fitzpatrick, 4 F.C.C.R. 847 (1989) at 903 ¶ 50.

[2]The statute reads in pertinent part:

> All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is broadcast, be announced as paid for or furnished, as the case may be, by such person . . . .
>
> . . . .
>
> The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

47 U.S.C. § 317(a)(1), (c).

other than on the air giveaways." Initial Decision of Chief Administrative Law Judge Thomas B. Fitzpatrick, 4 F.C.C.R. 847, 897 ¶ 15 (1989) ("Initial Decision"). The ALJ concluded that, because no station had ever been cited for this practice, he would not rule that WHYI had "willfully and/or knowingly" violated the sponsorship identification requirement. Id. at 15.

The Review Board, on the other hand, concluded that the ALJ erred in finding Southeast financially qualified because the Board

II. ANALYSIS

The FCC has broad discretion in granting broadcasting licenses. When reviewing FCC comparative hearings, we must satisfy ourselves that "the agency [engaged] in reasoned decision-making, articulating with some clarity the reasons for its decision and the significance of the facts particularly relied on." Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 49 (D.C. Cir. 1978), cert. dismissed sub nom. Coyles Broadcasting, Inc. v. Central Florida Enterprises, Inc., 441 U.S. 957 (1979); see also Cascade Broadcasting Group, Ltd. v. FCC, 822 F.2d 1172, 1173 (D.C. Cir. 1987).

Petitioner's main allegations are that the Commission granted an unwarranted renewal expectancy to Metroplex and erred in finding both that Metroplex did not commit payola violations and that Southeast was not financially qualified. We find that there is substantial evidence in the record to support the Commission's reasoning on each of these issues.

A. Renewal Expectancy

The FCC may grant a renewal expectancy credit to an existing station if that station has a record of substantial service to the public. FCC v. National Citizen's Comm. for Broadcasting, 436 U.S. 775, 805 (1978). Petitioner contends that WHYI's record does not qualify for such a credit and that in evaluating the renewal expectancy factors, the Commission gave too much weight to the factor of reputation.

Petitioner says that WHYI's record cannot be classified as "substantial" under the controlling criteria[3] because the amount of non-entertainment programming was "minuscule," falling well below the amount "faulted by the Court" in Monroe Communications Corp. v. FCC, 900 F.2d 351 (D.C. Cir. 1990). We find that argument unpersuasive.

First, the FCC says it has abandoned primary reliance on a quantitative standard for non-entertainment programming in renewal expectancy cases since Deregulation of Radio, 84 F.C.C.2d 968 (1981), opting instead to determine what "substantial service" consists of on a case-by-case basis. The FCC has discretion to create its own standards for renewal expectancy as long as it engages in reasoned decisionmaking. WHYI's record supports the FCC's decision to grant it renewal expectancy credit. See Initial Decision at 850-53 ¶¶ 21-47 (detailing the extent of WHYI's locally-produced and locally-oriented programming and air times).

Second, as for Monroe, it is not dispositive here because the facts in the two cases are quite different. In Monroe, station Video 44 had undergone, late in its license term, what appeared to be a permanent format change involving a marked and permanent cutback in the quantity and quality of its non-entertainment programming. In reviewing Video 44's renewal application, we said

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[3]The criteria are: (1) the amount of non-entertainment programming presented, the time of day it is presented and whether it is directed to local needs and interests, (2) the amount of locally produced programming, and (3) the reputation of the station in the community. Third Further Notice of Inquiry and Notice of

the Commission erred in evaluating the station's programming record over the entire license period. We remanded for a reevaluation of the station's record, giving greater weight to the period after the format change. In this case, there was no format change, and the ALJ, Board and Commission all agree after in-depth review that the non-entertainment programming was adequate, especially in view of its responsiveness to and origination in the local community.

Finally, we reject the allegation that the FCC relied too heavily on the station's reputation; the only evidence presented on that issue was the testimony of twenty-three local witnesses, all on behalf of WHYI. While Southeast argues that these "licensee-selected" witnesses were not a representative sample, it provided no witnesses of its own nor indeed any other evidence as to opposing community views. Under such circumstances we cannot fault the Commission's decision.

B. Sponsorship Identification

There is a statutory obligation on licensees under the Federal Communications Act, 47 U.S.C. § 317, "to make a sponsorship identification announcement when matter is broadcast in return for any money, service or other valuable consideration received by the licensee." Initial Decision at 895 ¶ 4.[4] Consideration received for broadcasting material without such sponsorship identification is referred to as payola.[5] Petitioner alleges that the ALJ improperly placed the burden of proving payola on Southeast, and

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[4]See supra note 2.

[5]See Public Notice, 3 FCCR 7708 (1988).

it raises three questions: First, whether the misplaced burden of proof affected the licensing outcome; second, whether payola occurred; and third, whether there can be a separate § 317(c) violation for lack of diligence to prevent payola if no payola is found to have occurred.

1. Burden of Proof

Southeast alleges, and the FCC does not dispute, that it was improperly given the burden of proving WHYI had violated § 317 of the Act once the issue was specified by the ALJ. The Commission found this error to be harmless because Metroplex presented sufficient evidence on payola to support a ruling that the station did not receive consideration for which an announcement should have been made. We find that the record supports the Commission's conclusion that a shift in burden would not have altered the decision. Initial Decision at 897 ¶ 18.

2. Payola

Southeast claims that Metroplex violated § 317(a) by requesting from record companies multiple copies of records (fifty or more) and the services of recording artists for free concerts at reduced talent rates without making announcements that it had received such consideration. Whether these actions affected the choice of broadcast material is, of course, a question of fact for the Commission to decide based upon substantial evidence in the record. 5 U.S.C. § 706(2)(E) (1988).

The ALJ noted that the multiple copies were received only after the albums had been already rotated onto the play list, and

[redacted]

We need not reach this question of statutory interpretation because the ALJ and Board also found that even if no payola need be shown for a violation, Metroplex evidenced sufficient diligence in its efforts to prevent any such occurrence. Its prevention procedures included employee submission of "payola affidavits" every six months, distribution of an employee handbook which warned against the crime of payola, direct communication of this concern to the employees by the general manager and a three-person music selection committee designed to minimize the possibility of payola. Initial Decision at 897 ¶ 18. The Commission supported this finding, noting that "the record does not indicate that . . . Metroplex failed to exercise reasonable diligence to prevent violations of § 317 from occurring." Memorandum Opinion and Order, 5 F.C.C.R. at 3610 ¶ 4. We express no view on the Commission's statutory interpretation.

C. Other Issues

As to other allegations, we find the ALJ correctly declined to add the issue of candor because Southeast's petition was not supported by the affidavit of someone with personal knowledge, as required by FCC rules. In re Applications of Metroplex Communications, Inc. (WMYI-FM), FCC 87M-1301 slip op. at 4 ¶ 7 (June 8, 1987). Further, the Commission acted within its discretion in deciding that there was not "sufficient doubt" on the candor and equal employment opportunity issues to warrant further inquiry. Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 395 (D.C. Cir. 1985).

We need not decide the complex issue of Southeast's financial qualification, as we are upholding the Commission's determination that Metroplex is the preferable candidate even if Southeast is financially qualified. Memorandum Opinion and Order, 5 F.C.C.R. at 5610 ¶ 4.

Finally, we dismiss petitioner's argument that it did not receive a fair hearing because it was characterized as an "abusive applicant" in the original version of a Commission publication, a designation subsequently removed from later versions. "[T]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing." Withrow v. Larkin, 421 U.S. 35, 55 (1975). The burden was on Southeast to overcome the assumption that administrators are "capable of judging a particular controversy on the basis of its own circumstances." Id. This burden has not been met.

For the foregoing reasons, the petition for review is denied.


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